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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.818 OF 2007

M/s.Neelkanth Mansions Limited Petitioners
versus
V.Vishwanath and others Respondents

Mr.S.U.Kamdar, Sr.Counsel with Brijesh Upadhaya i/by M/s.Purnanand & Co. for petitioners.

Ms.R.Peerbhoy for respondents 2 and 3.

Respondent no.1 in person present.

Mr.V.B.Naik i/by M/s.DSK Legal for intervenor.

CORAM : A.P.DESHPANDE, J.

DATE : 12TH JULY 2007

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1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of parties.

2. The respondent no.3 is a co-operative housing society whereas fourth respondent is the secretary of the said society. The respondent nos.1 and 2 are the members of the society. The respondent nos.1 and 2 filed a dispute before the Co-operative Court and challenged a resolution passed by respondent no.3 society in its general

body meeting whereby it was decided to transfer TDR rights in favour of present petitioner for a consideration of Rs.3.35 crores. The said resolution was acted upon by the society so also the present petitioner, which culminated in execution of an agreement dated 31st December 2001. The dispute was filed by the respondent nos.1 and 2 some time in February 2002 and it is the case of the petitioner that during pendency of the dispute the resolution was conformed in the next general body meeting of the society held on 11th August 2002.

3. The respondent nos.1 and 2 filed an application seeking temporary injunction with a view to restrain the petitioner and respondent no.3 society from acting in terms of the agreement dated 31st December 2001. On account of grant of temporary injunction by the Co-operative Court, the present petitioner so also respondent no.3 society filed two separate appeals before the Maharashtra Co-operative Appellate Court and the judgment and order passed in the said two appeals has been called in question by filing the present writ petition. The main ground of attack is that though the parties did not agree for any settlement or

filing of the consent terms, the appeals have been disposed of on an assumption that the parties had entered into a binding settlement. A perusal of the order passed by the Co-operative Appellate Court reveals that the Co-operative Appellate Court has recorded all the contentions raised by all the parties to the dispute extensively in his more than 35 pages judgment. However, in the concluding paragraphs the Co-operative Appellate Court has observed as follows :-

> "... ... I do not want to go in detail of the matter at this prima facie stage for the simple reason that on hearing arguments of both side ld. advocates in both these appeals this Court negotiated the matter with the parties and their advocates in open court by putting specific proposal. That proposal is as under :"
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> To call fresh tenders by paper publication selling TDR obtaining necessary permission from the concerned authorities. On receiving sealed tenders, to call special general body meeting and to open the sealed tenders in that meeting and after opening to accept tender of highest bidder by passing resolution in the said special general body meeting by giving preference to the present developer who is appellant in appeal No.129 of 2005 to accept tender of highest bidder and if he accepts, then to execute a fresh agreement for development and in case he refused to accept tender of highest bidder, then to return the amount invested by him to the tune of Rs.66 lakhs with bank interest on current

> account and to entrust the work to highest bidder by executing fresh agreement for development as per terms and conditions worked in the same special general body meeting and to proceed further with development work of tile property of the society. This proposal put up by this Court to safeguard the interests of both sides and the said proposal accepted by all the parties and their advocates in Open court and sought 3 to 4 adjournments to file consent terms. But lastly the respondent Nos.1 and 2 (original disputants) refused to file consent terms only on the ground that the matter is sub-judice before the Court and injunction order is in force.
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> When the proposal put up by the Court accepted by both side parties and their advocates in open court while negotiating matter, I think it proper not to discuss and observe the legality and validity in the impugned order passed by the Trial Court. I think it proper that there is no need to decide the applicability and non-applicability of the citations placed before me by both side ld. advocates. Accordingly, I answer Point No.1 as does not survive and shall proceed to pass following order:"

What is seen from the above extracted passage is that the Court tried to negotiate and settle the matter between the rival parties. However, in the end, respondent nos.1 and 2 (original disputants) refused to file consent terms. The Court has disposed of both the appeals by directing the society to call fresh tenders for sale of TDR and the highest offer received under the tender be informed to the present petitioner and if and in case petitioners are ready to match

the highest offer in the tender, then the TDR be sold to the present petitioners.

4. The impugned order is dated 4th November 2006. The petitioners filed a writ petition in this Court on 18th January 2007. The matter came up before the learned Single Judge of this Court on 7th February 2007 on which date this Court was informed that the petitioner has already approached the Co-operative Appellate Court by moving a motion for speaking to minutes with a view to seek a clarification that the present petitioner did not agree to the settlement on the basis of which the appeals have been disposed of. It is the case of the petitioner that they did not consent to the proposal of the Co-operative Appellate Court. On the contrary, the negotiations had fizzled out. The petitioner had rightly approached the Co-operative Appellate Court as it was observed in the impugned order that by consent of the parties the said order was passed. The learned Judge who had disposed of the appeals was seized of the application for a period of about two to three months and the grievance is that he did not pass any order on the application seeking clarification. After the transfer of the Presiding Officer who has passed

the impugned order, the application was taken up by his successor in office and the Judicial Officer who was not in know of the facts and what transpired while passing of the impugned order, has proceeded to deal with the said application at the touch stone of Section 152 of the CPC.. The Court has rejected the application moved by the petitioner by holding that the relief claimed therein falls outside the scope of Section 152 and power cannot be exercised under that section.

5. In this backdrop of facts and circumstances the learned senior advocate appearing for the petitioner has submitted that the petitioner had a statutory right of appeal and the same has been rendered nugatory by the First Appellate Court by declining to decide the appeal on merit. It is submitted that though the parties did not agree to the proposal put forth by the Co-operative Appellate Court, the Appellate Court has passed an order in terms of the said proposal by recording an incorrect factual position that all parties had consented and agreed to the proposal put forth by the Co-operative Appellate Court. From the impugned order it can be gathered that the parties did not agree to file consent terms. The learned counsel appearing for the petitioner

has placed on record a copy of the order sheet maintained in the concerned appeals by the Co-operative Appellate Court. The order sheets, I am informed, are dictated by the Court. From the order sheet it is seen that the appeals were argued on 14th September 2006 and the arguments were concluded on 15th September 2006. The order sheet of 15th September 2006 records thus:-

> "... ... After conclusion of arguments and reply argument of both the advs. I think it proper to take chance to settle the matter amicably by negotiation and seeks longer date in both the appeals.
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> Therefore in the interest of justice by consent of both side advs. both the appeals are adjourned for settlement/ pronouncing judgement to 11/10/2006."

Thereafter the matter was adjourned and came up before the Court on 30th October 2006. The order sheet of 30th October 2006 throws light on the question as to whether, did parties consent to the proposal of the Co-operative Appellate Court or the negotiations failed. The order sheet which according to me clinches the issue is dated 30th October 2006 and the same reads thus:-

> "... ... Possibility of settlement ruled out. Hence A.O. is adjourned to

4/11/2006 for judgment and order."

6. Drawing support from the order sheet of 30th October 2006 it is vehemently submitted that leave aside arriving at a settlement, even a possibility of settlement was ruled out by the Court and the appeals were fixed for pronouncement of judgment. Even before this Court not only the petitioner but also the respondent nos.1 and 2 maintained that at that time no settlement was arrived at between the parties before the Co-operative Appellate Court on the basis of which the impugned order is passed as if the same is an consent order.

7. The learned counsel appearing for the society, however, submits that she is not aware as to what really transpired before the Appellate Court. However, the society has acted in pursuance of the order passed by the Co-operative Appellate Court and taken steps in pursuance of the same.

8. There is one more limb to this controversy and the same is occurrence of subsequent events after passing of the impugned order by the Co-operative Appellate Court. As directed by the

Co-operative Appellate Court, the society has issued tender notice and invited tenders seeking offers for transfer of TDR.. Pursuant to this exercise, the society received three offers and the offer of the intervener in these petitions was the highest offer. According to the intervener, he has offered the consideration in the sum of Rs.12.50 crores and out of which, according to the intervener, he has paid a sum of Rs.65.00 lakh while submitting the tender and at a latter point of time he has also paid a sum of Rs.3,12,50,000/- being one fourth of the amount of consideration to the society. This payment of Rs.3,12,50,000/- has been made on 12th February 2007 on which date an agreement was entered into between the society and the intervener. It will not be out of place to mention at this stage that the writ petition was filed on 18th January 2007 and the intervenor had appeared before this Court on 7th February 2007 and was in know of the pendency of the writ petition when he chose to enter into an agreement and has paid a sum of Rs.3,12,50,000/-. The learned counsel further submits that in the last week a further amount has been paid to the society.

9. In my opinion, the entire exercise of calling

of tenders, intimating the petitioner about offer of the highest bidder and entering into an agreement with the highest bidder, has no bearing on the question that arises for consideration in this petition. If the impugned order passed by the Co-operative Appellate Court is found to be unsustainable and bad in law, the action taken pursuant to the said order will also fall to the ground and the same is the obvious position.

10. Thus, reverting back to the main question as to whether, is the Co-operative Appellate Court justified in disposing of the appeal against the order arising out of an interlocutory order passed by the Co-operative Court without dealing with the merit, is legal and proper will have to be considered. As noticed from the impugned order and the corresponding order sheets maintained by the Co-operative Appellate Court it has come to light that the parties had not agreed to any settlement. On the contrary, the parties had declined to file consent terms. The negotiations had failed and the order sheet dated 30th October 2006 records that ‘possibility of settlement ruled out’. If parties were not ready and willing to accept the proposal put forth by the Co-operative Appellate Court, the Court could

not have forced the same on the parties. The Court was obliged to decide the appeals on merit. I am at pain to notice that though the impugned order runs into 40 pages, besides referring the arguments advanced by the learned advocates for the respective parties, the Court does not decide the issue but abruptly concludes the judgment and order by disposing of the appeal as if the same was based on consent terms or in accordance with some settlement which in fact did not take place.

11. After hearing the learned advocates for the respective parties I have no iota of doubt in my mind that the parties had not entered into any settlement and had not accepted the proposal put forth by the Co-operative Appellate Court. If this be the position, then the impugned order is wholly unsustainable in law inasmuch as the order is bereft of the reasons in support of the conclusions in the operative order. No contentions raised by the counsel are dealt with and with a risk of repetition I go on record that the disposal of the appeals is under an assumption that the parties have come to a settlement. The impugned order passed by the Co-operative Appellate Court is wholly unsustainable in law and thus deserves to be

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quashed and set aside.

12. In the result, the impugned order passed by the Co-operative Appellate Court dated 4th November 2006 in A.O.Nos.126 of 2005 and 129 of 2005 is quashed and set aside. The matter is remanded back to the Co-operative Appellate Court for a de-novo enquiry and hearing. In the facts of the present case I deem it proper to direct the Co-operative Appellate Court to decide both the appeals as expeditiously as possible and preferably within a period of three months from today on merits and in accordance with law.

13. It is made clear that the Co-operative Appellate Court shall proceed to decide the appeals uninfluenced by the observations made in this judgment. Rule is made absolute in the above terms. No order as to costs.

(A.P.DESHPANDE, J.)

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FARAD CONTINUATION SHEET

CIVIL APPLICATION NO.578 OF 2007
IN
WRIT PETITION NO.818 OF 2007

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Office Notes, Office Memorandum of Coram, appearances, Court's orders or directions & Registrar's orders	Court's or Judge's order

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Mr.V.B.Naik for applicants.

Mr.S.U.Kamdar, Sr.Counsel with Brijesh Upadhaya i/by M/s.Purnanand & Co. for writ petitioners.

Ms.R.Peerbhoy for respondents 2 and 3.

Respondent no.1 in person present.

CORAM : A.P.DESHPANDE, J.
DATE : 12th JULY 2007

PC :

1. Application for intervention is allowed and disposed of.

(A.P.DESHPANDE, J.)